

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 09-0651

JERALD DAVIS COCKRELL,

Petitioner and Appellant,

v.

STATE OF MONTANA, DEPT. OF
JUSTICE, DRIVER'S LICENSE BUREAU,Respondent and Appellee.

REPLY BRIEF OF APPELLANT

On Appeal from the Montana Twenty-First Judicial District Court,
Ravalli County, The Honorable James A. Haynes, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF THE ISSUE.....	1
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	1
SUMMARY OF ARGUMENT ON REPLY	2
ARGUMENT ON REPLY	2
THE DISTRICT COURT ERRONEOUSLY FOUND THAT THE ARRESTING OFFICER HAD PARTICULARIZED SUSPICION TO STOP COCKRELL’S VEHICLE.....	2
CERTIFICATE OF SERVICE	5
CERTIFICATE OF COMPLIANCE.....	6

TABLE OF AUTHORITIES

CASES

Brown v. State, 2009 MT 64, 349 Mont. 408, 203 P.3d 842	3
State v. Gilder, 1999 MT 207, 295 Mont. 483, 985 P.2d 147	3

STATEMENT OF THE ISSUE

Was it error for the district court to conclude as a matter of law that sufficient articulable, objective data was shown at hearing to justify a stop of Appellant's vehicle?

STATEMENT OF THE CASE

The Statements of the Case as related by Appellant and Respondent in their respective briefs are sufficient for purposes of this appeal.

STATEMENT OF FACTS

The facts as set forth by the parties are, in general, accurate. Dispute exists, however, with regard to the alleged wide turns. The State assumes as "fact" that Appellant (Cockrell) did indeed make two wide turns and, in the turn from Main Street to Third Street, Cockrell's vehicle drove into the parking stalls on Third Street. (Appellee's Br. at 3.) To be clear, there are no parking stalls marked in the area where the arresting officer said there were and there are no center lines marking the division of the roadway. In addition, Cockrell disputes that the officer's recorder captures the turn onto Third Street from Main Street. Cockrell maintains he drove in a normal, safe manner throughout the sequence of driving leading to his eventual arrest.

SUMMARY OF ARGUMENT ON REPLY

The issue in this appeal is very narrow and concerns the solitary matter of particularized suspicion to stop a vehicle for further investigation of wrongdoing. Cockrell asserts the arresting officer is incorrect in his assessment of his driving. The arresting officer's recollection of the facts are questionable, given the fact that he reports there are marked parking spaces when there are not. (See Ex. B in Appellant's Br.) In addition, the arresting officer ignores the obstructions at intersections when reporting and testifying about the stops at yield signs. The arresting officer was simply trolling for a suspect along "bar row" in Stevensville and made his "facts" fit the reasons for a stop.

ARGUMENT ON REPLY

THE DISTRICT COURT ERRONEOUSLY FOUND THAT THE ARRESTING OFFICER HAD PARTICULARIZED SUSPICION TO STOP COCKRELL'S VEHICLE.

The State bases its entire argument on the accuracy of the arresting officer's testimony at hearing. There is no argument that driving on the wrong side of the road is a traffic infraction. The State incorrectly states, however, that William Buzzell, a witness called by Cockrell, supports the finding of the district court. (Appellee's Br. at 11.) Buzzell simply agreed that if a driver drove on the wrong side of the road it would be a traffic infraction and may be sufficient to warrant a stop. (Tr. at 35-36.) The issue is whether Cockrell actually did drive in the

manner that the arresting officer testified he did. Buzzell went on to testify the streets in the area of Stevensville where Cockrell was driving are very narrow, would cause, especially at night, a driver to be more cautious at intersections and that even in daylight hours, it is necessary to “swing wide” when making turns. (Tr. at 36-39.)

Cockrell is fully aware of the plethora of case law in Montana in accord with *Brown v. State*, 2009 MT 64, 349 Mont. 408, 203 P.3d 842, and the resulting difficulty for an appellant in proving the State’s action was improper. In the instant case, however, the arresting officer’s statements in his investigative report clearly show the officer was not observing what he reported he was observing. A finding by a court is clearly erroneous if it is not supported by substantial evidence, the court has clearly misapprehended the effect of the evidence, or this Court is left with a definite and firm conviction that the district court made a mistake. *State v. Gilder*, 1999 MT 207, ¶ 7, 295 Mont. 483, 985 P.2d 147. Here, the district court erred by finding the arresting officer’s testimony reliable when the arresting officer reported such observations as “touch[ing] the lines of the parking spaces on the North side of Valley Drug.” (See Ex. B in Appellant’s Br.) There is no dispute that such lines do not exist. That “mistake” alone should cause the arresting officer’s report to be very cautiously considered. As stated in Cockrell’s opening brief, there is no street lighting, and the determination that Cockrell was driving

into the opposite lane of traffic on roads so narrow two vehicles have trouble passing from opposite directions, as well as the “observation” that Cockrell’s vehicle touched imaginary lines, makes these alleged observations subjective, rather than the required objective compilation of data to justify a stop of a vehicle.

The State argues that while lines marking the center of the road would have been helpful to determine where the Cockrell vehicle was situated on the road, such markings are not necessary for an observer to determine if a vehicle is on the right side of the road. (Appellee’s Br. at 12.) Cockrell argues in reply that that statement is inaccurate because the arresting officer saw lines where none exist and was only guessing subjectively where the center lines might be if they existed. The State’s argument would carry more weight if the arresting officer had reported actual facts instead of what he perceived to be facts. The State cannot escape the reality of the situation here – that Cockrell exited a parking space in the area of three bars on Main Street in Stevensville after dark and was targeted by the arresting officer without sufficient particularized suspicion to effect the stop. This Court should reverse the findings of the district court and reinstate Cockrell’s privilege to drive.

RESPECTFULLY SUBMITTED this 27th day of April, 2010.

David E. Stenerson

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing reply
brief of Appellant to be mailed to:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this reply brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 5,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

David E. Stenerson